STATE OF MICHIGAN

COURT OF APPEALS

DENIS OUELLETTE, Plaintiff-Appellee,	UNPUBLISHED July 18, 2013
V	No. 310184 Wayne Circuit Court
AUTO CLUB GROUP INSURANCE COMPANY, Defendant-Appellant.	LC No. 09-023224-NF

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

In this action for no-fault benefits, defendant appeals by right the judgment entered in favor of plaintiff. We vacate the judgment, reverse the grant of partial summary disposition, and remand for proceedings consistent with this opinion.

Plaintiff was employed by Custom Business Solutions, Inc. (CBS), but was contracted to work at DTE Energy (DTE). Plaintiff was injured in an automobile accident. Several months after the accident, he was diagnosed with a detached retina, and his physician correlated the injury to the automobile accident. Plaintiff initially had surgery in April 2008, and did not work for a ten-day period. However, he required a second surgery in early May 2008, and missed a week of work. Plaintiff returned to work for an additional 35 days, but his contract with DTE was terminated on June 25, 2008. Although plaintiff was paid no-fault benefits for the time that he was on medical leave, he requested work loss benefits following his termination by DTE. Specifically, plaintiff allegedly was told that if he took time off for a second surgery, he would be replaced. On the contrary, defendant asserted that plaintiff's continued employment following the second surgery evidenced that his termination was not related to his medical absences.

Plaintiff moved for summary disposition, alleging that the only evidence of the reason for his termination was his own testimony. Defendant alleged that plaintiff's evidence was inadmissible hearsay and his continued employment following surgery demonstrated that he was not terminated because of his auto related injuries. At the hearing, the trial court questioned the underlying reason for plaintiff's discharge. Plaintiff's counsel acknowledged that there were depositions taken in a federal lawsuit brought by plaintiff against CBS and DTE that contained evidence regarding the reason for plaintiff's discharge. The trial court adjourned the hearing,

and the parties filed supplemental briefs with deposition testimony and employment records filed in the federal litigation. The trial court ultimately granted partial summary disposition in favor of plaintiff. Following a hearing, the trial court ruled that defendant was not entitled to a setoff for other benefits paid, ordered penalty interest, and granted plaintiff's request for attorney fees. Defendant appeals by right.

Defendant contends that the trial court erred by granting partial summary disposition in favor of plaintiff with regard to the issue of liability when a factual dispute existed regarding the reason for plaintiff's termination. We agree. A trial court's ruling on a motion for summary disposition presents a question of law subject to review de novo. *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 317; 783 NW2d 695 (2010). Initially, the moving party must support its claim for summary disposition by affidavits, depositions, admissions, or other documentary evidence. *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012). Once satisfied, the burden shifts to the nonmoving party to establish that a genuine issue of material fact exists for trial. *Id*. "The nonmoving party may not rely on mere allegations or denials in the pleadings." *Id*. The documentation offered in support of and in opposition to the dispositive motion must be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999). Mere conclusory allegations that are devoid of detail are insufficient to create a genuine issue of material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362, 371-372; 547 NW2d 314 (1996).

When ruling on a motion for summary disposition, the court does not assess the credibility of the witnesses. *White v Taylor Distrib Co, Inc*, 482 Mich 136, 142; 753 NW2d 591 (2008). "Summary disposition is suspect where motive and intent are at issue or where the credibility of a witness is crucial." *Foreman v Foreman*, 266 Mich App 132, 135-136; 701 NW2d 167 (2005). When the truth of a material factual assertion made by a moving party is contingent on credibility, summary disposition should not be granted. *Id*. at 136. The trial court may not make factual findings or weigh credibility when deciding a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 437; 702 NW2d 641 (2005). It is the function of the trier of fact to resolve issues regarding credibility and intent. *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 174; 530 NW2d 772 (1995). When the evidence conflicts, summary disposition is improper. *Lysogorski v Bridgeport Charter Twp*, 256 Mich App 297, 299; 662 NW2d 108 (2003). Inconsistencies in statements given by witnesses cannot be ignored. *White*, 482 Mich at 142-143. When witnesses testify to diametrically opposed assertions of fact, the test of credibility must lie where the system has reposed it – with the trier of fact. *Kalamazoo Co Rd Comm'rs v Bera*, 373 Mich 310, 314; 129 NW2d 427 (1964). Application of disputed facts to the law present proper questions for the jury or trier of fact. *White*, 482 Mich at 143.

The purpose of the no-fault act is "to provide accident victims with assured, adequate and prompt reparations at the lowest cost to both the individuals and the no-fault system." *Williams v AAA Michigan*, 250 Mich App 249, 257; 646 NW2d 476 (2002). "Given the remedial nature of the no-fault act, courts must liberally construe its provisions in favor of the persons who are its intended beneficiaries." *Frierson v West American Ins Co*, 261 Mich App 732, 734; 683 NW2d 695 (2004) (further citation omitted). Personal protection insurance benefits are also known as "first party" or "PIP" benefits. *McKelvie v Auto Club Ins Ass'n*, 459 Mich 42, 44 n 1; 586 NW2d 395 (1998). "Under the no-fault automobile insurance act, MCL 500.3101 *et seq*., insurance

companies are required to provide first-party insurance benefits referred to as personal protection insurance (PIP) benefits for certain expenses and losses. MCL 500.3107; MCL 500.3108. PIP benefits are payable for four general categories of expenses and losses: survivor's loss, allowable expenses, work loss, and replacement services." *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Work loss benefits compensate the injured person for income he would have received but for the accident. *Marquis v Hartford Accident & Indemnity (After Remand)*, 444 Mich 638, 645, 648-649; 513 NW2d 799 (1994). A heart attack or a period of incarceration may constitute an independent intervening event that does not allow for work loss benefits. *Id*. at 649. Voluntary termination from employment does not amount to a supervening event that interrupts the "but for" chain of causation, but may be relevant to the issue of mitigation of damages. *Id*. at 649-650. An employee is entitled to work loss benefits when a disability has been removed, but the employee is unable to return to work because he was replaced. *Nawrocki v Hawkeye Security Ins Co*, 83 Mich App 135, 136-137; 268 NW2d 317 (1978). The statute "requires no more than that the work be lost as a direct consequence of the injury." *Id*. at 144. Consequently, pursuant to *Marquis* and *Nawrocki*, an injured plaintiff may recover work loss benefits when the period of disability has ended, but the plaintiff was unable to return to employment because of a replacement, provided there was but for causation between the accident and the work loss, and mitigation of damages may be examined.

When plaintiff first moved for summary disposition, he alleged that his deposition testimony regarding the reason for his termination was dispositive. That assertion is erroneous. When the truth of a material factual assertion made by the moving party is contingent on credibility, summary disposition is improper. *Foreman*, 266 Mich App at 136. Thus, even if defendant failed to present witnesses to contest the reason for the termination, the jury was still entitled to view the credibility of plaintiff's testimony. However, when the evidence is examined as a whole, there are diametrically opposed versions of events regarding plaintiff's performance and the reason for the early termination of his contract, and therefore, summary disposition was improper because the issue must be resolved by the trier of fact. *Kalamazoo Co Rd Comm'rs*, 373 Mich at 314. Although plaintiff's records and his deposition testimony indicate that plaintiff's work was shifted to another employee, defendant's deposition testimony contradicts plaintiff's evidence. Plaintiff's supervisor at DTE, Joseph Franzen, and his supervisor at CBS, Mark Johnson, testified that plaintiff's termination was premised on poor performance. This factual dispute precluded summary disposition, and the trial court erred by granting the motion.

It should be noted that plaintiff contends that defendant failed to present admissible documentary evidence to oppose the motion for summary disposition. We disagree. Plaintiff contends that defendant admitted that plaintiff's claims for benefits were causally related to the accident. However, this admission does not warrant summary disposition in plaintiff's favor. The fact that plaintiff made a *claim* for benefits related to his accident injuries is a separate question from whether the claim is deemed to be payable. Whether it is a coverable expense pursuant to his automotive policy or the no-fault act is a separate and distinct inquiry.

Next, plaintiff contends that defendant failed to present admissible documentary evidence because Franzen and Johnson were not named on its witness list, and therefore, defendant could not admit this evidence at trial. However, the trial court adjourned the motion for summary disposition and requested that the parties file additional documentary evidence regarding the reason for the termination. In light of the trial court's specific request, the evidence was

appropriately submitted and considered during the dispositive motion. Furthermore, although Franzen and Johnson were not named on the witness list, defendant's witness list reserved the right to modify the list to name witnesses that become known as well as rebuttal witnesses. In light of the trial court's instruction to present additional evidence on the issue of termination from the federal lawsuit, the witness list addressed this scenario through defendant's reservation. Additionally, the decision to allow an undisclosed witness to testify rests within the trial court's discretion. *Pastrick v General Tel Co*, 162 Mich App 243, 245; 412 NW2d 279 (1987). "Trial courts should not be reluctant to allow unlisted witnesses to testify where justice so requires, particularly with regard to rebuttal witnesses." *Id*. "If reasonable conditions can allow the testimony of the undisclosed witness to be admitted without prejudice to the opposing parties, then we see nothing wrong with permitting the witness to testify subject to those conditions. No party is prejudiced and the jury is afforded a fuller development of the facts surrounding the case." *Id*. at 246. Accordingly, defendant could call Franzen and Johnson as rebuttal witnesses even if they were not named on the witness list. Plaintiff contends that he was terminated because of his replacement due to surgeries. However, these individuals contend that plaintiff's termination was performance based. They would have been appropriate rebuttal witnesses. Their testimony was known to plaintiff because it was developed in the federal litigation, accordingly plaintiff cannot claim prejudice. *Id*. Therefore, the contention that defendant failed to present admissible documentary evidence is without merit. The trial court erred by granting partial summary disposition in favor of plaintiff.[1]

Vacated, reversed, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction. Defendant, the prevailing party, may tax costs.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause

[1] In light of our holding that the trial court erred, we do not address defendant's issues addressing setoff, penalty interest, and attorney fees. Those issues need only be addressed if the trier of fact concludes that plaintiff was entitled to the work loss at issue. Moreover, there was a factual dispute surrounding the sufficiency of the evidence submitted to support the work loss. For purposes of completeness, we note that the trial court declined to apply any setoff, citing plaintiff's policy. However, the lower court record does not contain plaintiff's policy, only an excerpt. Moreover, this Court permitted setoff of federal unemployment and retirement disability benefits to avoid the duplication of recovery and to contain insurance costs. See *Moore v Auto Club Ins Ass'n*, 173 Mich App 308, 310-311; 433 NW2d 355 (1988) citing the test of *Jarosz v DAIIE*, 418 Mich 565, 577; 345 NW2d 563 (1984). The policy must be examined in the context of the relevant case law if the trier of fact concludes that work loss was payable following plaintiff's termination.